



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XA723]

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The National Marine Fisheries Service (NMFS) is issuing permits for a period of three years to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in certain U.S. commercial fisheries.

DATES: These permits are effective for a three-year period beginning [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Reference materials for these permits, including the final negligible impact determinations, are available on the Internet at

[https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-](https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-section-101a5E-authorization-commercial)

[section-101a5E-authorization-commercial](https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-section-101a5E-authorization-commercial) or <http://www.regulations.gov>, identified by

Docket Number NOAA-NMFS-2020-0096. Other supporting information is available on

the Internet including: recovery plans for the ESA-listed marine mammal species,

[https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-](https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act)

[species-under-endangered-species-act](https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act); MMPA List of Fisheries,

[https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-](https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables)

[summary-tables](https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables); the most recent Marine Mammal Stock Assessment Reports (SARs) by

region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine->

mammal-stock-assessment-reports-region, and stock,
<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans,
<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

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SUPPLEMENTARY INFORMATION: The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: 1) the incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; 2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and 3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. We have made the determination that certain commercial fisheries meet these three requirements and are issuing permits to these fisheries to authorize the incidental take of ESA-listed marine mammal species or stocks under the MMPA for a period of 3 years. We are also providing a list of commercial fisheries that, based on their level of M/SI of ESA-listed marine mammal species, do not require authorization under MMPA 101(a)(5)(E) so long as any incidental mortality or injury is reported.

Background

The MMPA List of Fisheries (LOF) classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to 3 years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. We originally evaluated ESA-listed stocks or species documented on the 2020 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02-238 "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals." Based on this evaluation, we proposed to issue permits

under MMPA section 101(a)(5)(E) to vessels registered in five Category I or Category II commercial fisheries, as classified on the final 2020 MMPA LOF, to incidentally kill or seriously injure individuals from specific ESA-listed marine mammal stocks (85 FR 62709, October 5, 2020). Since our original assessment, the 2021 final MMPA LOF published on January 14, 2021 (86 FR 3028) and became effective on February 16, 2021. The 2021 LOF reflects new information on marine mammal incidental mortality and serious injury in commercial fisheries, which we incorporated in our updated assessment. The 2021 LOF removed one of the stocks (Central North Pacific stock of humpback whale) from the list of species/stocks incidentally killed or injured in the Category II Alaska Bering Sea, Aleutian Islands Pollock trawl fishery that we proposed to include on the list of authorized stocks to be taken incidental to fishing operations in this fishery (85FR62709, October 5, 2020). Thus, we have removed the Central North Pacific stock of humpback whale for the Alaska Bering Sea, Aleutian Islands pollock trawl fishery from the final list of commercial fisheries authorized to take specific threatened and endangered marine mammals incidental to fishing operations (see Table 1 below).

Table 1 – List of Commercial Fisheries Authorized to Take (M/SI) Specific Threatened and Endangered Marine Mammals Incidental to Fishing Operations

Commercial Fishery	LOF Category	ESA-Listed Marine Mammal Stock
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline	I	Sperm whale, Northern Gulf of Mexico
HI deep-set longline/Western Pacific pelagic longline (HI deep-set component)	I	False killer whale, Main HI Islands Insular Humpback whale, Central North Pacific
AK Bering Sea, Aleutian Islands flatfish trawl	II	Bearded seal, Alaska Humpback whale, Western North Pacific Ringed seal, Alaska Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands pollock trawl	II	Bearded seal, Alaska Steller sea lion, Western U.S.
AK Gulf of Alaska, sablefish longline	II	Sperm whale, North Pacific

Category III fisheries are those commercial fisheries that have a remote likelihood of or no known incidental mortality or serious injury of marine mammals (MMPA

section 118(c)(1)(A)(iii)). All commercial fisheries classified as Category III on the current LOF do not require MMPA 101(a)(5)(E) authorization, so long as any mortality or injury of marine mammals incidental to their operations is reported pursuant to MMPA section 118(e). Furthermore, per NMFS' Procedural Directive 02-204-02 (procedural directive), "Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)" (NMFS 2020), NMFS considers such Category III fisheries to have a negligible impact on that marine mammal stock or species. Thus, we incorporate by reference all Category III fisheries included in the 2021 MMPA LOF (86 FR 3028, January 14, 2021).

In addition, for the purposes of MMPA section 101(a)(5)(E), commercial fisheries classified as Category I or II on the LOF solely because of incidental M/SI of non-ESA-listed marine mammals meet the definition of a Category III commercial fishery with respect to ESA-listed stocks or species because the fishery has a remote likelihood of or no known incidental M/SI of ESA-listed marine mammals. Based on the 2020 MMPA LOF, we previously determined that two Category II commercial fisheries, the AK Bering Sea, Aleutian Islands Pacific cod longline and the HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component), met this criterion (85 FR 62709, October 5, 2020). The HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component) changed classification from Category II to Category III in the 2021 LOF (86 FR 3028, January 14, 2021), but given that this was already considered a Category III commercial fishery with respect to ESA-listed stocks or species, this change in classification does not change our proposed determination. Thus, the AK Bering Sea, Aleutian Islands Pacific cod longline and the HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component) commercial fisheries do not require 101(a)(5)(E) authorization.

NMFS is evaluating other commercial fisheries not listed here for purposes of making a negligible impact determination (NID) and anticipates addressing such fisheries in future **Federal Register** notices. More information about the commercial fisheries listed above is available in the 2021 MMPA LOF (86 FR 3028, January 14, 2021) and on the Internet at

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

Tribal fisheries conducted pursuant to a treaty with the United States are not included on the LOF, and are not subject to the requirements of section 101(a)(5)(E). In the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995), NMFS concluded that treaty tribal fisheries are conducted under the authority of the Indian treaties; the MMPA's requirements in section 118 do not apply to treaty Indian tribal fisheries. In the 2010 final LOF (74 FR 58859, November 16, 2009), NMFS re-evaluated its 1995 conclusion to exempt tribal fisheries from the LOF (60 FR 45086, August 30, 1995) to determine whether it should be changed due to *Anderson v. Evans* 314 F.3d 1006 (9th Cir. 2002)(court found that the MMPA applied to the Makah tribe's proposed whale hunt and the tribe's proposed whale takings were not excluded by the treaty with the tribe).

NMFS considered, among other things, the public comments received on the proposed 2010 LOF and the 1994 amendments to the MMPA and accompanying legislative history, and determined that *Anderson v. Evans* did not alter NMFS' original analysis in the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995). Thus, tribal fisheries are not included on the LOF nor considered for MMPA 101(a)(5)(E) authorizations. Additional information on NMFS' decision to continue to exclude tribal fisheries from the LOF is provided in the 2010 LOF final rule (74 FR 58859, November 16, 2009). NMFS continues to work on a government-to-government

basis with the affected treaty tribal governments to gather data on injuries and mortalities of marine mammals incidental to tribal fisheries.

For each commercial fishery listed in Table 1 above, we reviewed the best available scientific information to determine if the fishery met the three requirements in MMPA 101(a)(5)(E) for issuing a permit. This information is included in the 2021 MMPA LOF (86 FR 3028, January 14, 2021), the marine mammal SARs, recovery plans for these species (available at: <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the documents describing the preliminary and final determinations supporting the permits (go to <https://www.regulations.gov> and enter “NOAA-NMFS-2020-0096” in the search box).

NMFS is in the process of reviewing humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), based on the recently finalized Procedural Directive 02-204-03: “Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are reviewed in light of the DPS designations, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (*e.g.*, selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the ESA and has been incidentally killed or seriously injured incidental to the analyzed commercial fishery. NMFS considers humpback whale stock designation a high

priority for revision. Once NMFS has completed our review, we will revise humpback whale stock designations in future SARs.

Basis for Determining Negligible Impact

Prior to issuing a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103 as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to adversely affect the species or stock through effects on annual rates of recruitment or survival.”

Criteria for Determining Negligible Impact

Through scientific analysis, peer review, and public notice, NMFS developed a quantitative approach for determining negligible impact. We finalized the NMFS Procedural Directive 02-204-02 (directive): “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)” effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>. This procedural directive describes a process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing an MMPA section 101(a)(5)(E) permit as noted above).

The procedural directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT_T), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower

threshold, Single NIT (NIT_s) represents the level of M/SI from a single commercial fishery that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI, but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_T. If NIT_T is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_T is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s. If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_T and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing an MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a negligible impact determination). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue an MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial

fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determinations

We evaluated the impact of each commercial fishery (listed in Table 1 above) following the procedural directive, and, based on the best available scientific information, made NIDs. These NID analyses are presented in accompanying MMPA 101(a)(5)(E) determination documents that provide summaries of the information used to evaluate each ESA-listed stock documented on the 2021 MMPA LOF as killed or injured incidental to the fishery. The final MMPA 101(a)(5)(E) determination documents are available at: <https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-section-101a5E-authorization-commercial> or <https://www.regulations.gov> under Docket Number “NOAA-NMFS-2020-0096”. Based on the criteria outlined in the procedural directive, the most recent SARs, and the best available scientific information, NMFS has determined that the M/SI incidental to the five Category I and II commercial fisheries listed in Table 1 will have a negligible impact on the associated ESA-listed marine mammal stocks. Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for these commercial fisheries.

Recovery Plans

Recovery Plans for the ESA-listed species or stocks listed in Table 1 have either been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>) or are being developed. Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

Take Reduction Plans

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stocks considered for these permits are designated as strategic stocks under the MMPA because they, or a component of the stocks, are listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The short- and long-term goals of a TRP are to reduce M/SI of marine mammals incidental to commercial fishing to levels below the Potential Biological Removal (PBR) level for stocks and to an insignificant threshold, defined by NMFS as 10 percent of PBR, respectively. The obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs when funding is insufficient. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS uses the most recent SARs and LOF as the basis to determine its priorities for establishing Take Reduction Teams (TRT) and developing TRPs. Information about NMFS' marine mammal TRTs and TRPs may be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

All of the evaluated fisheries listed in Table 1, for the affected marine mammal species or stocks, either have a TRP in place or, based on NMFS' priorities, implementation of a TRP is currently deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see determinations supporting the permits available on the Internet at <https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa->

section-101a5E-authorization-commercial or <https://www.regulations.gov> under docket number “NOAA-NMFS-2020-0096”).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. Each of the fisheries listed in Table 1 considered for authorization under MMPA section 101(a)(5)(E) is monitored by NMFS fishery observer programs. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Therefore, the requirement for vessel registration is satisfied.

Conclusions for Permits

Based on the above evaluation for each commercial fishery listed in Table 1 as it relates to the three requirements of MMPA 101(a)(5)(E), we hereby issue MMPA 101(a)(5)(E) permits to the commercial fisheries in Table 1 to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, NMFS will re-evaluate whether to amend or modify that specific authorization, after notice and opportunity for public comment, or potentially suspend or revoke the permit. If the authorization for an individual fishery in Table 1 changes for any reason during the 3-year period, the authorizations for the other commercial fisheries in Table 1 will continue unchanged and effective until the end of the

3-year period. As noted above, under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries, or for the Category II commercial fishery listed above that meet the definition of a Category III commercial fishery with respect to ESA-listed species or stocks, so long as any incidental marine mammal mortality or injury is reported to NMFS pursuant to MMPA section 118(e).

Endangered Species Act Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of these commercial fisheries on ESA-listed marine mammals for which permits are proposed here, were analyzed in the appropriate Fishery Management Plan ESA section 7 Biological Opinions, and incidental take was exempted for those ESA-listed marine mammals for each of these fisheries as appropriate.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because these proposed permits would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plans is required for these permits. Issuing the proposed permits would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Comments and Responses

NMFS received two comment letters on the proposed issuance of permits and underlying preliminary determinations. The Center for Biological Diversity, Defenders of Wildlife, the Humane Society of the United States, Humane Society Legislative Fund,

and Whale and Dolphin Conservation (CBD *et al.*) opposed issuing the permits, while the Hawaii Longline Association (HLA) supported issuing the permits. Several comments addressed ESA-related elements outside the scope of the proposed actions and are not included here. Under section 7 of the ESA, biological opinions analyze the impact of fishery-related mortalities on ESA-listed marine mammals, including those species analyzed as part of negligible impact determinations. MMPA section 101(a)(5)(E) permits authorize take of ESA-listed marine mammals under the MMPA while biological opinions authorize take of ESA-listed marine mammals under the ESA. Only responses to substantive comments pertaining to the proposed permits and preliminary determinations under MMPA section 101(a)(5)(E) are addressed below.

Comment 1: CBD *et al.* incorporate their previous comments submitted on NMFS' draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)," and reiterate NMFS' new approach to negligible impact determinations undermines key statutory protections for marine mammals protected as threatened or endangered under the ESA and disregards congressional intent that NMFS provide ESA-listed marine mammals with more protections than non-listed marine mammals.

Response: NMFS received several comments on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E) stating the directive was either overly precautionary or not precautionary enough. These comments were previously addressed in the response to comments (see Comment #4) on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)." NMFS notes, that while we have used negligible impact determination criteria since 1999, these criteria were "never formalized as an official agency policy." As such, to say we are changing or increasing its thresholds or reducing protections is inaccurate because these thresholds were never formally established. The full response to comments on the

procedural directive is available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>.

Comment 2: CBD *et al.* assert that NMFS improperly equates negligible impact to a stock's PBR level, using the Main Hawaiian Islands Insular stock of false killer whales as an example.

Response: NMFS has previously responded to this broader comment in the responses to comments on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" procedural directive (see Comment #4). As noted, it is true that NIT_T is equivalent to PBR for an endangered stock if, and only if, the default Recovery Factor (Fr) is used in calculating PBR; but in all other cases (i.e., for threatened stocks and for any endangered stock not using the default Fr) NIT_T is less than PBR. Thus, NIT_T , and the negligible impact determination it informs, is afforded independent meaning. The full response to comments on the procedural directive is available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>.

Comment 3: CBD *et al.* comment that the negligible impact criteria fail to assess the implications of unknown or declining population trends for conformity with the underlying assumptions of PBR, specifically for North Pacific sperm whale, bearded seal, ringed seal, Northern Gulf of Mexico sperm whale, and Main Hawaiian Islands insular false killer whales. As such, the resulting determinations are arbitrary and improper.

Response: Stocks or species with unreliable or unknown abundance trends do not necessarily deviate from the underlying assumptions of the PBR framework. Based on the most recent SARs and other available scientific information, the abundance trends for the North Pacific sperm whale, bearded seal, ringed seal, Northern Gulf of Mexico sperm whale, and Main Hawaiian Islands insular false killer whale are currently unknown.

However, the lack of a clear abundance trend does not by itself indicate a stock does not conform to the PBR framework.

For the North Pacific sperm whale, there are insufficient data for estimating abundance and several key uncertainties regarding the stock assessment. However, uncertainty regarding the stock's assessment does not necessarily mean the stock fails to conform to the PBR framework. Unlike SARs for stocks that may not conform to the PBR framework (*e.g.*, Beluga Whale, Cook Inlet stock), the current North Pacific sperm whale SAR does not note any such concerns. If a species or stock's population dynamics are thought to not conform to the underlying assumptions of PBR, this would be addressed through the stock assessment process (NMFS 2016). The draft NID for the North Pacific sperm whale erroneously indicated that the stock fails to conform to the PBR framework because we lack sufficient information; we have modified the final determination accordingly. This 101(a)(5)(E) authorization remains active for up to 3 consecutive years, but should new information become available it may be shortened or revoked if necessary.

Comment 4: CBD *et al.* state that there is no recovery plan in place for the Main Hawaiian Islands (MHI) Insular false killer whale stock and without a recovery plan to address all potential anthropogenic impacts, allowing take would violate the precautionary principle. CBD *et al.* also state that no take should be authorized in the absence of a recovery plan for this stock.

Response: Since publication of the proposed authorizations, NMFS published the MHI Insular False Killer Whale DPS Draft Recovery Plan, which may be accessed here: <https://www.fisheries.noaa.gov/resource/document/draft-recovery-plan-main-hawaiian-islands-insular-false-killer-whale-distinct>. Following review of public comment, which closed on December 15, 2020, NMFS anticipates finalizing the recovery plan and recovery implementation strategy for the MHI Insular false killer whale.

Comment 5: CBD *et al.* note that none of the Alaska fisheries included in the proposed permits have TRPs in place and suggest they do not appear to be in development. CBD *et al.* point out that while NMFS has deferred establishment of TRTs for these fisheries to focus on establishing TRTs for other species or stocks that are a higher priority, the assessment of those species and stocks have not been made publicly available. CBD *et al.* believe that NMFS should not authorize take of ESA-listed species if a TRT is not in place, particularly where NMFS is not requiring additional mitigation measures to reduce the risk of entanglement through this permitting process.

Response: MMPA section 118 provides the framework for addressing marine mammal interactions in commercial fisheries nationwide and includes various metrics and guidance for managing the take reduction program as a whole. As noted earlier in this notice, MMPA section 118(f)(3) contains specific priorities for developing TRPs if insufficient funding is available to develop and implement TRPs for all applicable stocks and fisheries. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. Thus, NMFS prioritizes which stocks and fisheries to address under a TRP. MMPA section 118(f) provides that if there is insufficient funding available to develop and implement a take reduction plan for stocks that interact with Category I and II fisheries, the Secretary shall give highest priority to the development of TRPs for species or stocks whose level of incidental mortality and serious injury exceeds PBR, that have small population size, and those that are declining most rapidly. As noted in the proposed permit, all stocks authorized to be incidentally taken under this permit are currently lower priorities for developing TRPs because of the low levels of M/SI incidental to commercial fishing compared to other marine mammal stocks and commercial fisheries.

Comment 6: CBD *et al.* state that NMFS cannot reasonably conclude that the impact of the Alaska Bering Sea, Aleutian Islands flatfish trawl fishery on the Western

North Pacific humpback whale stock is negligible because NMFS relies on outdated M/SI data for its determination.

Response: The proposed negligible impact determination for the Alaska Bering Sea, Aleutian Islands flatfish trawl indicated that “recent M/SI” data were unavailable to analyze for the Western North Pacific humpback whale stock. We have modified this phrasing in the final determination to more clearly indicate that recent M/SI data are available for this species but that no M/SI incidental to the Alaska Bering Sea, Aleutian Islands flatfish trawl fishery has been documented.

Comment 7: CBD *et al.* disagree with NMFS that all Category III fisheries in the 2020 List of Fisheries are not subject to the ESA prohibition against incidentally taking marine mammals from endangered or threatened stocks, and counters that these Category III fisheries remain subject to the prohibition on take under the ESA unless and until take is authorized under one of the statutory processes enumerated by the ESA (*e.g.*, an incidental take statement or incidental take permit).

Response: We concur that all fisheries remain subject to ESA prohibitions on the incidental taking of marine mammals from endangered or threatened species. We have modified the relevant language in this notice to clarify that all fisheries remain subject to ESA prohibitions on the incidental taking of marine mammals from endangered or threatened stocks.

Comment 8: CBD *et al.* comment that a Category III designation does not mean that a fishery is unlikely to “take” an ESA-listed marine mammal, because any entanglement of an ESA-listed marine mammal constitutes a prohibited take under the ESA, regardless of whether it leads to mortality, and NMFS does not consider sub-lethal entanglements in categorizing fisheries.

Response: For the purposes of MMPA 101(a)(5)(E)(i)(I), only incidental mortality and serious injury are considered when making a negligible impact determination.

Comment 9: HLA agrees with NMFS' preliminary determinations that the HI deep-set longline/Western Pacific pelagic longline (HI deep-set component) has a "negligible impact" on the Central North Pacific humpback whale stock and the MHI Insular false killer whale stock. They also note there have been no interactions between the fishery and Central North Pacific humpback whales.

Response: NMFS has finalized the NID for the HI deep-set longline/Western Pacific pelagic longline (HI deep-set component). To clarify, there was at least one observed serious injury of a Central North Pacific humpback whale incidental to the Hawaii deep-set longline fishery in 2014. However, known humpback whale mortality and serious injury in Hawaii-based fisheries involved whales from the Central North Pacific stock as designated under the MMPA, which has been identified as the Hawaii DPS of humpback whales. The Hawaii DPS is not listed as threatened or endangered under the ESA. Because MMPA Section 101(a)(5)(E) applies only to stocks designated as depleted because of their listing under the ESA, a Tier 2 analysis was not conducted for the Hawaii DPS.

Comment 10: HLA agrees that for the MHI Insular false killer whale stock, the deep-set longline fishery satisfies the NID requirements of Tier 1 and further notes that Tier 2 is also satisfied, because the deep-set longline fishery's M/SI with the Insular false killer whale stock is 0.0 in the most recent SAR, which plainly falls below the Insular false killer whale stock's NIT_s value.

Response: Based on the best available scientific information, the total human caused M/SI (including M/SI from the HI deep-set longline/Western Pacific pelagic longline, HI deep-set component fishery) of MHI Insular false killer whales does not exceed NIT_T as part of a Tier 1 analysis. Therefore, as defined in NMFS Procedural Directive 02-204-02, all commercial fisheries are considered to have a negligible impact

on the stock, and no further analysis for individual fisheries, including a Tier 2 analysis, is required at this time (NMFS 2020).

References

- National Marine Fisheries Service (NMFS). 2020. National Marine Fisheries Service Procedure 02-204-02: Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E). 20 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>.
- National Marine Fisheries Service (NMFS). 2019. National Marine Fisheries Service Procedure 02-204-03: Reviewing and designating stocks and issuing Stock Assessment Reports under the Marine Mammal Protection Act. 9 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>
- National Marine Fisheries Service (NMFS). 2016. National Marine Fisheries Service Procedure 02-204-01: Guidelines for preparing stock assessment reports pursuant to the 1994 amendments to the Marine Mammal Protection Act. 23 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/guidelines-assessing-marine-mammal-stocks>.
- National Marine Fisheries Service (NMFS). 2014. National Marine Fisheries Service Procedure 02-238-01: Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals. 42 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations>

Dated: May 3, 2021.

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